Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

LINDA MISEK-FALKOFF,

Petitioner,

v.

ALAN DOUGLAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it violates constitutional protections of due process and equal protection of life and liberty and property, and fundamental principles of fairness in adversarial proceedings, for a court to rule weeks after trial that a party known and shown to be medically incapacitated across country at the time had been "substituted" at trial as her own counsel, and — in any event — whether unambiguous applications to be pro se at any point in time are relevant only to criminal contexts?

2. Whether it violates constitutional protections of due process and equal protection for life and liberty and property, and principles of fairness in adversarial proceedings, for a court to grant a motion for judgment on merits with no representation for the non-movant because the judge rules for the movant immediately without opportunity for opposition to be heard?

3. Whether (a) a Court's refusal to even consider or respond to application for (Title II related) accommodation under the Americans with Disabilities Act, (The ADA), ostensibly because deemed by the judge to be submitted *ex parte*, even though the compliance statute so allows but in fact all sides were on notice — and by such refusal the court blocks appeal of a denial — violates 'The Act' federally when implemented by a State statute? And (b) are further such declinations to act during trial under formidable conditions of disability colorably retaliatory or prohibitedly stereotyping?

PARTIES TO THE PROCEEDING

Petitioner Dr. Linda D. Misek-Falkoff, Ph.D., J.D., was a Petitioner to the Supreme Court of California for review of the Opinion of the California Fourth Department Division One Court of Appeal affirming the Superior (trial) Court in a case and trial arising in Trust and in Tort. (The early papers at suit bear the name "Misek-Falcoff," and this is corrected here as actually spelled, as documented to each respective court). She holds doctorates in Computing and Information Sciences, and the Humanities, and earned a Law Degree subsequent to her other studies and employment in institutes of higher learning and in industry. As she is now retired from these pursuits as professor and employee, she now works on the civil society side as a delegate of several non governmental organizations, principally at the United Nations, where she participates in events around communication and human rights including the currently forming International Disability Convention (Treaty) and other efforts on global health.

Respondent in this action was co-trustee to their parents' estate. He is an attorney who on belief is retired from employment in the San Diego Superior Court.

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A. The Supreme Court should take this case because Constitutional safeguards for equal protection and due process, and fundamental fairness in adversarial proceedings, are materially violated where a civil court rules apocryphally after a trial ends that the losing party had been substituted as her own counsel during the proceedings, and an affirming appellate court holds that it is an attribute of criminal trials only that *pro se* parties need to be knowing and able to be self-representing. 15

B. The Supreme Court should take this case because Constitutional safeguards for equal protection and due process, and fundamental fairness in adversarial proceedings, are materially violated where a civil bench trial court grants a merits victory to the movant, without representation for the non-movant, who had no

opportunity to oppose the adversary, sum up, or lodge her own motions.....19

C. The Supreme Court should take this case because Constitutional protections reflected in Federal Law prominently exist in outright refusal to respond to application for accommodations under the ADA, with subsequent rejection out-of-hand of physician verification of a party's medical incapacity — this refusal to read papers being suspect of retaliation for a prior ADA request, or impermissibly stereotyping of persons with disabilities. 25

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Linda D. Misek-Falkoff respectfully petitions for a Writ of Certiorari for this court to review the Fourth District, Division One decision of the California Court of Appeal, affirming the Judgment of the Superior Court of San Diego. The California Supreme Court subsequently denied Review. Direction to either court is respectfully requested.

ORDERS AND OPINIONS BELOW

The 12/20/02 Judgment after Bench Trial, San Diego Superior Court, Case No. GIC777112 (Linda B. Quinn, J.), appears here as Appendix B1.

The 11/15/04 Decision and Order of the Court of Appeal, Fourth Appellate District, Division One (per MacDonald, C.J.), Case No. D041742, is cited at 2004 WL 2580817 (Cal.App. 4 Dist) and appears here as Appendix B2.

The 03/16/05 denial of review by the Supreme Court of California, Case. No. S130273, appears at Appendix B3.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 USC 1257 (a).

The Court of Appeal Decision dealt with merits; the California Supreme Court denied review February 16, 2005, on a timely filed Petition. This present Petition is filed within the 90 days from that denial extended to June 16, 2005 by Honorable Justice Sandra Day O'Connor.

PROVISIONS OF LAW [At Appendix A, below]

INTRODUCTION

This Petition for a Writ of Certiorari questions whether constitutional due process and equal protection under the law has been or could be afforded where without presence of an advocate for plaintiff to raise opposition, the court grants a merits-based judgment for defendant and then subsequently, weeks after the trial ends, rules *ex post facto* that the plaintiff was during the trial substituted as her own counsel — even though at the trial itself the court knew that she was ill across country and in emergency medical care.

Incongruously, the Judgment (Appendix B1) states:

> JUDGMENT AFTER BENCH TRIAL (C.C.P. § 631.8) ...Peter A. Jaffe, Esq. of the Law offices of Peter A. Jaffe, appeared, pro hac vice, as attorney for Plaintiff Linda Misek-Falkoff, and during trial, was substituted by Plaintiff Linda Misek-Falkoff, in propria persona" [AA-201].[1]

But, to the contrary, the trial transcripts clearly show that in conversation with the plaintiff by telephone, the judge — who along with others in the courtroom had in hand physicians' documentation of plaintiff's medical incapacity – emphatically did not rule on any sort of substitution, but merely said goodbye with no questions or instructions as requested by the party.

It is respectfully submitted that ruling after a trial anachronistically as to important matters of court access and representation breaches the adversarial system materially at its base, and so starkly as to warrant high court review.

Moreover, this outcome of trial was presaged by avoidance of due process and equal protection even before

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[1] On principal point, Defendant's counsel records in the Notice of Entry of Judgment "Plaintiff" (Not "Plaintiff *Pro se*")…. And, with emphasis, in capitals, "To PLAINTIFF LINDA MISEK-FALCOFF AND ATTORNEYS DOUGLAS JAFFE AND PETER A JAFFE.

trial, when the court stated to the Applicant that it would not even respond to an application under the Americans with Disabilities Act ('The ADA') for two weeks to consult with specialists in head and face pain afflictions.

Petitioner also submits that the Court of Appeal in attempting to justify *ex post facto* rulings on representation in fact ratified unconstitutional developments, and that the Record will show a proper and timely filing was made under the ADA, and the law both federal and state requires a response in respect for the person and for the law — lacking which, indications of impermissible stereotyping and even retaliatory conduct may be difficult to avoid.

Further, and perhaps a holding of first impression, yet in a lengthy decision being persuasive authority in circulation, the Court of Appeal finds the predicates of knowing and able self-representation to hold only for criminal contexts. Petitioner respectfully seeks return of the case to the California Supreme Court or the Court of Appeal which last heard the merits.

STATEMENT OF THE CASE.

A. Underlying Action.

On behalf of Plaintiff, who resides in New York, Attorney Douglas Jaffe filed suit in the San Diego Superior Court against Defendant claiming continuing conversion of property rights and breach of fiduciary duty, the venue where the subject Trust was located and Defendant resides (Appellant's Appendix. 80). Before trial, Jaffe substituted-in his father, attorney Peter A. Jaffe, who resides in Colorado but moved among various states including New York and California and appeared *pro haec vice* in this case.

While merits may lie in facts[2] and this petition principally goes to the law, where at trial merits cannot be

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[2] It is not Petitioner's intent to review facts just *qua* facts here but rather to establish Petitioner's perspective toward the Court of

brought out as the court denies equal opportunity to do so the basic scenario may well be limned to show merits did indeed exist and are spread on the transcripts. Plaintiff showed that Defendant brought on massively large expenses and substantial distress for co-Trustee Plaintiff by threats to abandon the family property, including her own intellectual property and original art work and writings she personally created throughout her life, and that he alone as interface to warehouse transactions could by signature release it from the warehouse he had put it into such that it was basically impounded while she paid the costs. Defendant's position even at trial and therefore of Record seemed to be, anomalous to Plaintiff and source of great consternation and expense, that Plaintiff could have taken possession of the property earlier had she had funds and purpose to take upon herself the costs and toil of separating, after transport out of state, an unspecified two 'halves', of an entire household, and then undertake to ship back to him across country a demanded but unspecified "half"; and that, in any event, she should pay all the storage costs when the Trust, he asserted, ran out of funds, or he would let the whole go with some sort of abandon, most scenarios being destruction or passage to strangers.

Matters had turned even worse, as Defendant conceded and the trial transcript shows, when co-Trustee, senior sibling with physical problems including vision difficulties, multiple pain conditions, arthritis and other limiting conditions, who had traveled across country and with her spouse was left alone in the warehouse to sort out rooms of furniture and objects sacred and secular, while Defendant

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Appeal Decision as to facts in this Trust action which it asserts as underpinning its legal holdings. Insofar as a different view of the facts regarding due process and equal protection issues is raised here as well as questions of compliance with federal statute, the following narration goes to facts of pre-trial and post-trial events and the trial events in themselves.

moved out of town with valuables that were supposed to be examined together, leaving behind him unmarked and mis-marked boxes, damaged items of concern to warehouseman, and their bald impatience at his absence as the signatory.

Before trial, the appointed judge, Judge William Pate, recused himself after ruling at times against Plaintiff, the reason given being that prior he had worked with the Defendant as a member of the Staff of the Superior Court (AA. 103). The case was reassigned to the deciding judge, Judge Linda B. Quinn (AA. 104).

Because of a severe cranial pain condition (trigeminal neuralgia, as conveyed to the court) that would make the testifying difficult, after first making oral application, Plaintiff filed a California Rule of Court § 989.3 ADA Application for accommodation (AA. 154) with the statutory rules attached, and more than 5 days before trial, in order to have a two week adjournment because her own former neurosurgeon was close by in San Diego and she wished to meet with specialists during those very days concerning her condition, a physically based request to enable talking at length in spite of severe face and head pain, which Application the Defendant urged be treated as only academic not medical (Reporter's Transcript *passim*). (The court, which of record was chagrined more than once with the absence without report of plaintiff's attorney, refused outright to even respond to the request, as recorded in the Court of Appeal decision, and instead, as the latter court has done also, the trial court tallied against plaintiff's medical requests the requests by attorneys for continuances to fit their schedules (points raised on appeal). The refusal to even consider the § 989.3 ADA request stands in contrast to a court ruling a denial, which could provide for appeal. (App. Briefs and Oral Argument).

B. Trial and Aftermath.

The trial commenced with Plaintiff on the stand at length, and on the second day prolonged exposure to the

heavy air conditioning sprang a face head pain attack and seizure symptoms with heaving on the stand:

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MS. MISEK-FALKOFF A. Especially because I wasn't there, I didn't know how to think about it. I'm sorry, I'm sorry. That is not really a decorous response. Excuse me that my cognition works when my body doesn't. I'm not being sarcastic, I'm having a seizure.
Q. Are you all right?
A. Not really.
THE COURT: Do you need a break? Would you like a break?
MS. TANNENBERG: Maybe we should take a break.
THE COURT: Mr. Jaffe.
MR. JAFFE: Yes.
THE COURT: Do you need medical attention? Do we need medical attention? Do you agree that we should get medical attention?
(Recess)

With the assistance of Emergency services, Plaintiff stayed the day, having been told it was the last day of trial. The court, however, ruled that the trial would tentatively recommence ten days later due to the attorneys' schedules, which stranded Plaintiff as to medical care far from her physicians. After an extra day to rest up she returned to New York State. Plaintiff's spouse gathered and express-mailed documentation of ongoing hospital and physician office visits by Plaintiff over the interim (RT. 286. AA. 177ff., 194).

Unknown to Plaintiff, the trial did recommence on November 18, 2002, whereupon, she learned afterwards, continuance was denied with the court asserting it had not, again, read, and would not read, the medical submissions sent to all concerned in advance; the trial went forward with adverse witnesses. (RT. 289ff.). As set forth above and

evidenced in the transcripts available for observation, notified of this only after the proceedings that day, Plaintiff telephoned the court on November 19 to signal her availability to listen though just arisen from sick bed. As set forth on appeal, the attorney took the telephone and told the Plaintiff and her spouse both that he as counsel was going to tell the court that henceforth she was to function *pro se*, as her own counsel, and that he was withdrawing or had been relieved (RT. 425).

After a demonstrably confusing to all conversation where plaintiff averred that, having quit, the attorney was now terminated, and she would be *pro se* until she could from New York and while ill find a substitute attorney for the one now quitting and repeatedly insisting she be pro se for the case to survive.

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MS. MISEK-FALKOFF, your Honor ...
6 In all due respects, someone
7 with some knowledge of the facts must cross-examine
8 Mr. Douglas. I need the transcript, I need some
9 information. I can't hear very well over this connection.
10 And I'm not well.
11 Her Honor and Ms. Tannenberg keep telling
12 me I have a law degree and therefore I can pick up from
13 here. I think I should go to the San Diego County Bar
14 Association and get someone trained as better well bodied
15 to pick up from here, and I'm petitioning the Court to
16 give me some time to do that.

So very clearly on the record that morning, at several junctures, the court declared it could not make out a case for self-representation, including as follows:

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THE COURT: You're not making any sense.
19 Mr. Jaffe, you are not relieved from these proceedings by
20 The Court. If you can understand what your client's
21 position is, then all the better for you, but you're not
22 being released.

And,

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2 From what you've said in this last string
3 of words, I don't know what you want to do. So we are
4 going to proceed with the direct examination.

And in the afternoon — although denied by the Court of Appeal which misstates that no colloquy took place with the court at that crucial juncture — the court expressly abstained from ruling that the Plaintiff wished to be or could be or was to be self-representing or even referencing matters of representation at all.

Plaintiff, that is, did call back, contrary to the material error by The Court of Appeal (RT. 448ff., 11-19-02). As the transcript records, although the court made calling back optional, she did so to let the court know it was not possible even to listen in. (The Court of Appeal is correct that attorney Jaffe did not as the court requested report to the court if his client really wished to be *pro se*). The morning situation of having to reach the court by herself being strenuous, Plaintiff wished for closure and in respect to thank the court for its consideration, but attempting to hear testimony and the impossibility of seeing what was going on, and having no materials to even follow, as she expressed to the court in the morning; this prohibited even observing. The conversation is unambiguous, as is what ensued in the courtroom with the promise to bring back her side of the case [Trial Transcripts, Day 4].

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25 MS. MISEK-FALKOFF: Yes, your Honor. I won't be
26 able to stay today. I did cancel a very important medical
27 appointment at 4:15 or 4:20 my time. And I want to
pay my
28 respects to you ...

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4 I am extremely stressed ...
7 I only
8 heard this morning from a message left late last night on

Mr. Falkoff's separate phone that there was a trial. I promptly called this morning after the message was relayed, and tried to be at it. …

I cannot participate in these proceedings at this time, and my doctors tried to tell you that. I'm very heavily medicated, and I took it this morning, as I did yesterday and the day before. …

I didn't know there was a trial. …

No one ever breathed a word to us here that there were going to be any witnesses, so I only learned this morning …

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I have to go back to bed. I can't take it any more …

If there is anything else on this piece of paper, I really can't read it right now. Is there anything else that you would want to ask of me, because I certainly have never intended to be rude to you?

Anything but.

THE COURT: I don't have any questions, no.

MS. MISEK-FALKOFF: Thank you very much for your time and courteous attention to this matter.

THE COURT: Thank you.

MS. MISEK-FALKOFF: Good-bye.

THE COURT: Good-bye.

After the telephone connection was broken, and Attorney Jaffe having unknown to his client left the courtroom with, again, the court merely saying "goodbye," as shown hereafter, the Court continued — indicating it would call him back for Plaintiff's side in the future:

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THE COURT: I would propose the following. And I note for our record that the only participants in the trial that are remaining are Ms. Tannenberg and Defendant Mr. Douglas…

13 Well, my intention, because the
14 Plaintiff has not rested, is to hear your motion and
15 perhaps make some findings, and when those findings are
16 put into written form, to relay those to Mr. Jaffe and to
17 Ms. Misek-Falkoff and invite Plaintiff and their side to
18 present by declaration or by documents any additional
19 evidence that has not been submitted so far. In the event
20 that response creates a need to respond by declaration, we
21 can go ahead and do that. ...

Defendant here continued to testify unchallenged and unchallengeable by cross, and brought on his Motion for Judgment on Merits, and instead of calling back Plaintiff's side as promised the judge immediately granted the Defendants motion on all causes of action:

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21 THE COURT: Judgment on all causes of action is entered
22 on behalf of the Defendant. {Emphasis supplied].

Colloquy followed with family possessions discussed, Defendant averring he might lay them out on a football field for strangers to pick over, all to be known to both sides only after delivery of the trial transcripts weeks later, expenses again to be picked up by plaintiff. Even later, the victorious Defendant unilaterally as well as belatedly released the property from the warehouse, having witnessed throughout that it could not be released except by him:

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24 MS. TANNENBERG.... you don't have anything today indicating
25 that he has forfeited his right to have property, do you?
...

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1 MR. DOUGLAS the fact is I can't afford to move or maintain any of the
2 stored property, and it's by default that I am willing to
3 say, rather than have it thrown to the wolves, to let my

4 sister have it.[3]
5 THE COURT: I didn't hear that.[4]

But see Defendant's argument that even while Plaintiff was paying for all the storage by his insistence, he had never in

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[3] To the topic of vigilant hyper-controls maintained by Defendant-Respondent, on appeal he maintained that distributions of monies were plaintiff's ideas; at trial he admits that this distribution was the idea of another of his attorneys, which motion joinder could have elicited. And, weighing to the silenced merits counterposable against Defendant's motion for judgment, is the involvement of attorney Karen :

21 A. Well, I sent, as I review this e-mail, I sent
22 her e-mail telling her how this could be done, what Karen
23 Ladner wanted to do, and I think you will find e-mail
24 which my sister responded something like that would be
25 satisfactory, and that was about as firm I got to a yes,
26 and I took it as a yes and caused the checks to issue. I
27 wrote them.

As if a co-trustee of the estate herself, Defendant had Ms. Ladner take on writing a letter expressing that the mother had been moved from the family home to a nursing facility by Mr. Douglas, without notice or discussion, as came out at trial, hence interfering and inspiring others to collaborate on breach of trust through successive exclusions of major proportions.

[4] Opportunity for the non-movant to bring out the plaintiff's side of the case might have highlighted admissions by defendant's own witnesses that e.g. both sides would have to agree on distribution as provided in the Trust. As to Defendant's Trust duties to continue to make distributions but his lack of cooperation to do so even to this day: the jewelry and other possessions are of course less important as Trust 'products' than is the 'process' issue of refusal to cooperate or even communicate, as a co-Trustee, to further the decision making process. Cf. Trial Transcript page 337, out of Plaintiff's hearing, to one of Defendant's attorneys Karen Ladner, "And it is your testimony that both Doctor Falkoff and Mr. Douglas would have to agree on that distribution as provided for in the trust; is that right? A. That's what the trust says".

fact been ready to release it, which was indeed interference, and the following statement — made by Defendant's attorney in moving for judgment on the merits in the absence of any possible opposition by the Plaintiff — is clearly false:

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So there is no -- there is no interference with any right of Linda to have that property. She's only entitled to half, as they shall agree. They could sell it all and just divide the money. There is nothing that says that anybody has to have any particular items, and so there is no interference with any of her property rights in this trust.

Furthermore, as to both issues of representation and access as well, at pre-trial and mid-trial stages the judge had criticized Plaintiff for having filed "*ex parte*" under California's ADA Compliance Statute § 989.3, the request to which the court refused to respond because indeed the court said the application had been *ex parte* [sic]; similarly, the documentation by physicians that Plaintiff was incapacitated at mid-trial and unable to travel across country to return to the court also was dismissed, as the court said, unread. [Trial Transcripts, Day 1, Appellant' Appendix]

Upon Plaintiff's filing of a Notice of Appeal, even though the case is in tort and in Trust, the Court of Appeal actually supporting the appeal versus the Judgment ruled apparently *sua sponte:* that the Plaintiff could not represent the Trust due to California disallowance of *pro se* representations in Trust cases (demonstrating the implausibility of *pro se* designation at the Trial below) which bifurcation, without recourse, however, Appellant also appealed); that matters of timing and use of a letter-motion form for the ADA Application[5] determined defeat

[5] In briefing and At Oral Argument (October 14, 2004), details of the ADA submissions as timely and formally decorous were set to the record, in addition to discussion-of-record at trial.

(even though the lower court had so requested, and had not complained thereafter, and Plaintiff also by request attached the statutory rules); and that the Plaintiff had been *pro se* because of conversation on attorney withdrawal, before the actual voir dire and declining to so rule; and that, in any event, it is, according to the Decision, only in criminal trials that a self-representing party need be knowing and able.

REASONS FOR GRANTING THE WRIT

In Generality:

Because of the — if not unique, then at least unusual and thereby perhaps quite compelling — existence here of complete trial transcripts at the close of which two-sided representation has ceased, the Supreme Court can review the situation for the benefit of all litigants in several key, general, and overarching aspects as regards due process and equal protection under the Constitution, and make sense for the good of all of what it means to be representing a client, and in fact representing oneself in a court.

If the Court of Appeal means to say that there was substitution at trial, the problem is that this would substitute in as counsel a person on the other coast who could not see or hear the proceedings, for which perhaps reason the court said clearly it would get back to Plaintiff's side after the motion, specifying the attorney Mr. Peter Jaffe and then his client. Nor would the court's refusal to make the phone connections make sense in this picture. Or saying "goodbye" with no questions for a person saying they were too ill to stay on the telephone.

It also seems that there would be the problem that the court expressly says on the record that it will not afford the Plaintiff the connections to the court whereby by law and precedent the court calls the to-be-appearing party for convenience and expedition, not the other way around (and as in fact the Court of Appeal arranged quite elegantly at

Oral Argument), complying with and implementing California Rule of Court § 298 (APPENDIX A, here below), and the San Diego Court's own Rule 7, specifying that courts must contact parties for smooth operations; parties on their side for obvious reasons do not bear the duty to make connections or frame acoustics.

If the Court of Appeal means representation at a Trust trial does not matter if they can be prejudged before motions on the outcome, then there could be a whole raft of other problems for court access and representation under due process and equal protection. And major issues for the whole system of trials and of courts, the forum which traditionally lets or invites those in disputes to come to a neutral forum with equal rights to approach and be heard.

Similarly, it seems very problematic for many if disability-based requests are lumped in with attorney requests for scheduling changes (Here, the Court of Appeal at Defendant's behest accounts medical request #2 as a 6th. But., California Rule of Court § 375 on Continuances sets forth in pertinent part as a distinguishable reason for granting more time: "(§ c. ... (2) the unavailability of a party because of death, illness, or other excusable circumstances...").

Thus, the Supreme Court, with benefit to all trial parties, can assess whether this was an unlawful and unbalanced and indeed non-adversarial trial setting and therefore a fundamentally unfair one lacking proper attributes of court access and party representation.

And, overarchingly, this case presents the serious anomaly of a trial court retroactively, weeks after trial, ruling that a party — whether disabled or not — had been self-representing at the trial itself. This seems an historical anomaly and anachronism deeply impacting due process and equal protection in any court context and hobbling fair outcomes.

With Particularity

A. The Supreme Court should take this case because Constitutional safeguards for equal protection and due process, and fundamental fairness in adversarial proceedings, are materially violated where a civil court rules apocryphally after a trial ends that the losing party had been substituted as her own counsel during the proceedings, and an affirming appellate court holds that it is an attribute of criminal trials only that *pro se* parties need to be knowing and able to be self-representing.

Because here in a post-trial bench judgment about a month later the judge ruled that Plaintiff was substituted "*in propria persona*" at the trial, the transcripts must be searched for such a ruling at trial. This major issue of representation and access to courts devolves not on matters of involuntary *pro se* status except in the broad existential sense because the party did not know about it, but of invisible status and deprivation of rights of due process and equal protection in court proceedings.

While discussion of initial application to so appear because the attorney was quitting, told her so, and told the court Plaintiff was now *pro se* because the court did resist this as a possibility, having documentation that Plaintiff was on the other coast of the United States, without materials, ill and under diagnostic treatment on emergency bases, the court never did so decide. The court, in fact, clearly indicates on the record that the conversation was, in essence, confusing and at best ambiguous. In fact, the court after last speaking with Plaintiff and after allowing the attorney to apparently go off to other business, definitively indicated the intent to call him back later to balance the case.

It is respectfully submitted that substitution of counsel whether by another counsel or by one self-representing is not so casual a matter, requiring and deserving

memorialization and clearly communicated notification, and not something so non bearing as to be lightly sealed with a 'goodbye and no questions'

The influence on attorneys present and future can be augured by Westlaw abstracts, for instance. In Westlaw along with clear cases where the court is bound to notifying non-movant *pro se* parties that their turn has come, there is nothing vague about the due process factors to support equal protection.[6]

At serious issue here is whether because in a civil trial context and not a criminal one, it is or is not required that clear intent and not ambiguous representations are fundamental to establishing *pro se* status. If not, then unconstitutional self-representation by conscription can occur in trials, all the more remarkably when the court rules after and not during the trial, that self-representation was established at trial, and even more starkly strange here especially where the trial transcript shows otherwise.

The case of *Faretta v. California*, 422 US 806 (1975) which the appellate Opinion would distinguish because of a different court venue, the criminal court, is truly more important for its limning of the features of fair substitution of counsel by a party herself. *Faretta* held that a criminal defendant must be:

> "Made aware of the disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes open."

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[6] And California is not indifferent to the need for memorialization and verification on matters of substitution of counsel, especially regarding *pro se* or putative *pro se* transformations of cases, and all the more, trials. As per California Code of Civil Procedure § 284 and California Rule of Court § 376, later-to-be-averred substitutions of counsel must be duly memorialized so that someone is appearing for each adversary whether a possible substitution is by regular counsel or *pro se* nature or otherwise.

Justice Stewart wrote in that context concerning state of mind and intention, that a person:

> "has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so".[7]

Although The Court of Appeal deems the principles set out in *Faretta* and progeny[8] to be only relevant to criminal trial settings, this holding indeed in itself raises the issue whether in civil trials parties, even if they should wish to be in that status properly so described but are unable to perform that function, or who ambiguously make requests showing confusion or lack of volition, should be ordered to perform it if the situation makes this not possible.[9]

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[7] As to legal authority here probatively reflecting these sage precepts, cf. San Diego's own rules of Court 4.163 for probate, California Code of Civil Procedure § 284, Rules of Professional Conduct 3-700, and California case law such as *Ramirez v. Sirdevan* (1994) 21 Cal. App. 42 904, 26 Cal Rptr.2d 554, etc.) in addition to sound public policy considerations.

[8] Pointedly, see Justice Marshall dissenting in *Raulerson v. Wainright*, 469 U.S. 966, 105 S.Ct. 366, 83 L.Ed.2d 302, and elucidating the requirement that applications to be *pro se* not be ambiguous, and finding potentially reversible error where "The Federal Court of Appeals held that the state trial court had not committed reversible error because events subsequent to petitioner's assertion of the right demonstrated that petitioner's initial request was ambiguous."

[9] Appellant's Briefs below note with particularity where cases urged by Defendant and adopted in the appellate decision appear to be inapposite on facts and on the law; e.g. and materially, *pro se* cases such as *People v. Lopez* (1977) 71 Cal.App.3d 568) do not and reasonably would not convey that unaware, unknowledgeable, non-able status qualifies to underpin self-representation in courts. Thus, a 'test by contradiction', or 'contraries', Petitioner avers, fails to draw valid and supportable distinctions between 'standing' in criminal versus civil settings as Defendant/Respondent would have it as to requirements,

But it is submitted that is not as stark as here, where the party is unaware that it will be said afterwards they were *pro se* — that is, the court so designates after proceedings are finished. (Applying a test for a *reductio ad absurdum* flaw in the reasoning, it is respectfully submitted that as it stands the appellate decision appears to endorse a party being unaware of pro se status, unknowing of the implications were this to be so, and unable to be so – surely not a setting for due process and equal protection).

We have seen that, and the Court of Appeal acknowledges that, the Trial Court instructed the attorney to come back and confirm that the Plaintiff wanted to be *pro se*, as he attested, but that he was unwilling or not himself able to do so, but in any event he did not. Without even that second-hand attestation, the Trial Court took the topic no further at trial. Certainly one who does not know they have a role or status cannot fulfill its duties, let alone enjoy its rights.

Faretta seems indeed not irrelevant in either of the two circumstances because not knowing one is *pro se* should obliterate the possibility that one is, and here the Plaintiff clearly stated as appears on the record that she was unable to participate in any way.

The opportunity to interact in real time within the court context is a precious attribute of our culture, which should

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standards, and rules. California's Judge's Benchbook (1991) though directed to criminal (pre-) trial proceedings, notes similarly (citing to *Lopez)* the clear duties of courts to warn of dangers and detriments of self-representation and also to make clear rulings. See also in the same state *People v. (Jerome) Taylor*, No. B146094 (Cal.App. Dist.2 02/13/2002), on requirements that *pro per* (*se*) decisions must be intelligent and voluntary; and *People v. (Robert) Taylor*, Appeal No. 79 C. 2129 Cook Country Illinois (Palmer, J.) on duty of the court to ensure that the (party) is "advised of dangers and disadvantages of proceeding pro se," and with distinct reference to "Faretta requirements."

protect all litigants against retroactivity.

B. The Supreme Court should take this case because Constitutional safeguards for equal protection and due process, and fundamental fairness in adversarial proceedings, are materially violated where a civil bench trial court grants a merits victory to the movant, without representation for the non-movant, who had no opportunity to oppose the adversary, sum up, or lodge her own motions.

The Fifth Amendment to the U.S. Constitution calls for life, liberty and property interests to be protected by due process. The Fourteenth Amendment of the U.S. Constitution calls for equal protection under the law under due process. The nexus between them and other constitutional privileges as well as mutual duties of state constitution and federal can be briefed on the questions here raised. The California Constitution Article I.7, as one instance but a binding one, sets forth the grounds of equal protection and due process in all sorts of settings, in pertinent part:

> A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.

California Code of Civil Procedure § 631.8 on Motions for Judgment, in pertinent part, itself soundly explains the necessity and guarantee of equal voice for all parties in court at adversarial proceedings:

> (a) ... The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him ... [Underlining supplied] .

By contrast, here, the non-represented complainant side hand no chance to counter the affirmative defense of statute of limitations, even though there was ample evidence for the purpose: Defendant's warehouse conduct of abandoning a trustee's duty might have been voiced, and at a fair trial, the warehouse discovery of results from careless packing [4-RT-426-8], and some done secretively, would have emerged. There would have been an opportunity to argue for a four year statute with tolling predicated on continuing wrongs[10]. (See e.g., *Amador Valley Investors et. Al v. City of Livermore*, Civ. No._2004, 43 Cal App._d 483, for the concept that a new and separate cause of action arises with each new instance). And see, regarding general fiduciary duties to communicate, advise and counsel, and not use the trust or the co-trustee as a storefront.

Here, Defendant's ambivalence or ambiguity toward what he wanted to retain and the funds available to do this

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[10] The Court of Appeal appears to have overlooked the discussion in Appellant's Brief and extensive trial testimony concerning warehouse incidents even within a year of the Complaint, and the keying of the appeal to actual transcripts of trial, illustrating continuing wrongs by Defendant over several years under the stated causes of action. For example, and while it is just an instance among many where the Decision's disregard of and lack of reference to the Transcripts (though cited in Appellant's papers) occurs — the Decision's express denial of arrangements Plaintiff had made for a particular trip to a warehouse is controverted by the recorded trial testimony showing the converse, with Defendant himself canceling the visit — such events falling well within the time to file suit even without reference to continuing wrongs. But as to continuing wrongs, the transcript also shows that as late as the trial, Defendant announced on the stand his intention to release property only after the trial itself. (See also, as briefed, e.g., re continuing breaches of fiduciary duties: *Moore. v. Regents of University of California*, 51 Cal. d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (Cal. 07/09/1990); and California Probate Code § 16460).

played out against Plaintiff at very high rates in multiples of thousands of dollars and multiple instances of threats; Plaintiff was compelled to keep paying because Defendant before and during trial, continually kept Petitioner *in terrorum*[11] came up with scenarios of destruction of the family sacred household and personal property, discussed as "stuff" with the court by Defendant after being granted his motion, and threatening of laying the family things out on a football field, learned later on reading the transcripts[12].

California § 631 provides for merits based motions for judgment. But without both sides having opportunity to be heard — Movant and non-Movant alike – § 631 can hardly

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[11] As to whether cross-examination, motion joinder, or summation, affording due process on equal footing, could have turned the tide in a fair trial, testimony for both sides elicited that Defendant had removed that which he wished to his apartment, but Plaintiff's personal and professional property there in the family residence was impounded by him for years. Trial testimony evinced that he stated at various times he might destroy it, even going so far as to deny it was the family residence. Held hostage was, inclusively, original artwork by her and undergraduate and graduate research and writing as well as their parent's belongings, and many items of sentiment from early childhood onward stored in various locations on the property.

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24 Q. TANNENBERG: You never lived in that house, did you?
25 A. Of course I lived in that house.
26 Q. For how long?
27 A. Years and years and years, from being a girl.
28 Q. The house on Del Mar Avenue?

137

1 A. Yes, ma'am. The nurses lived in my bedroom
2 thereafter. I decorated that bedroom.

[12] Cf. [AA-91A]: "Mr. Douglas has no assets and no energy or desire to assist in the disposition of property in storage at this time." (Cheryl A. Edwards-Tannenberg, Esq.) [Emphasis. supplied]. Resources of Co-Trustee not considered.

be satisfied.

The case law which Petitioner has seen to date concerns situations no doubt serious and stressful, but none are found, at least so far, where a merits victory is awarded the only party with counsel. But one case does note that, in contradistinction to the events here, in *Urethane Foam Experts, Inc. v. John Latime* (1995), 31 Cal. App. 4th 763, the Court of Appeal reversed a therein-procedural judgment on the basis that the trial court erred in allowing counsel of record for the Defendant to withdraw without advising the client of the consequences of the failure to obtain new counsel.

> Rule 376 was clearly designed to protect a client's rights when its counsel of record seeks to withdraw. Rule 376 requires the court to inform a party of *767 the consequences that may result from failure to obtain substitute counsel. Here, the court did not discharge this duty. Hence, the court erred in allowing counsel of record to withdraw without advising Urethane of the consequences of failure to obtain new counsel. We therefore conclude that the order was ineffective, and the court erred in permitting counsel of record to withdraw without giving proper advice to Urethane.
>
> The court's error led to a trial at which Urethane did not appear and the entry of judgment against Urethane in favor of Latimer in the amount of $285,997 plus costs and prejudgment interest.

(The withdrawal was ruled ineffective under California Rule of Court 376, citing to 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 74, recording voiding of judgments which violate the statute).

It is not claimed the cases are on all fours. Unlike *Urethane*, the trial Transcripts show that in this instance the present trial court did not even rule that the attorney could withdraw even though unknown to his client he made multiple efforts to do so the day before when the client was not contacted.

As the transcript shows, the court due to the prior day's proceedings had reason to believe the attorney, who did not report back to the court as ordered to assure *pro se* status was a real possibility, did not receive a withdrawal ruling and certainly no substitution. Unknown to his client, but read later in the transcript is just this very brief conversation, cryptic to the reader and especially when not witnessed.

443:

28 I can no longer participate in
444 1 the trial.
2 THE COURT: Thank you, Mr. Jaffe. I appreciate
3 the difficult position that you are in right now.
4 MR. JAFFE: And I appreciate all your
5 courtesies, your Honor.
6 THE COURT: Thank you.
7 (Mr. Jaffe exits the courtroom.)

What is in common is that late and emergency notice is not real notice in any rational sense and could not stimulate a rational choice especially for one on heavy medication during equally intense medical testing.

Again, on the merits and the developed trial record, advocacy for Plaintiff if included might have frontally opposed on the submitted evidence here previously cited admissions by Defendant that he was holding back and basically impounding the property while extorting funds from her to pay for his half being saved, an unspecified half; hence a counter motion could have been proffered or other relief achieved

Furthermore, since by his own admission multiple times on the record and under oath that he was detaining the whole while not particularizing his "half" Defendant was impounding and 'converting' on a continuing basis.

At issue is the ex post facto conscription of a party as if self-representing at trial, to give the appearance of balance and fairness.

C. The Supreme Court should take this case because Constitutional protections reflected in Federal Law prominently exist in outright refusal to respond to application for accommodations under the ADA, with subsequent rejection out-of-hand of physician verification of a party's medical incapacity — this refusal to read papers being suspect of retaliation for a prior ADA request, or impermissibly stereotyping of persons with disabilities.

The State Court refusing outright to respond to the Accommodation Application under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., which appellate court itself describes as "implemented by California Rules of Court Rule § 989.3," amounts to a profound infraction of 'The Act' as expressly set forth as a duty, in the latter, state statute; the mid-trial rejection without reading of physician attestations seems also impermissibly dismissive..

These overt, and presumably refractory refusals to seriously respond to medically grounded circumstances and documentation, and indeed scattered disparagements, appear to be plainly violative of 'The Act'. Construably, they show unlawful disrespect for both 'The Act' and the applicants. To the point, the Court of Appeal itself recognizes as the trial judge refused to that a "medical affliction" (of severe pain) was the reason for the formal request; and not attending an academic conference, as Defendant, himself claiming disabilities, treated the matter:

> A few days prior to the scheduled trial, Linda mailed a letter to Judge Quinn seeking an order rescheduling the trial to November 18, 2002. She asserted this date would (1) permit her husband to complete his doctors' appointments before trial and (2) enable her to attend a conference [sic] in San Diego (scheduled for November 14 through 17) where she could consult with physicians specializing in her medical affliction.

And the Court of Appeal does not hide the fact that the

Superior Court refused to consider the Application; refused to respond to it, hence hobbled any potential appeal – or, more properly, prevented appeal, and this is not permissible under the statute (viz. Instruction (g)). Nor did the Judge choose to give the applicant any reason or allow reformation of anything perhaps not desirable, in the court's eyes. The appellate acknowledgment confirming refusal to respond and be federally compliant is here embedded:

> Linda's request, purporting to be a "request for an accommodation" under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) as implemented by California Rules of Court Rule 989.3, [FN6] was not considered by the trial court because of its putatively ex parte nature and because she was represented by counsel. [Emphasis supplied].

But this does not comport either with the court inviting a letter-motion form application with rules attached, and complaining of *ex parte* submission (though sent to all parties) or, more crucially, with the federal Act itself. Judge Quinn said nothing about the letter motion form or the timing (which again was indeed more than a week before the trial date for which the subject-certain temporal accommodation was submitted).[13] A Response is required by law.

Nor does the Decision's discussion of how one appeals a denial of an ADA accommodation request seem to logically cohere. If there is not an express denial,

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[13] The published ADA instructions probably also warrant a close look by courts to see how the instructions might be misleading and perilous for persons with disabilities. In Witkin, e.g., there are two commas, delimiting three genre options as to format for filing, elsewhere there appears but 1 comma, thereby delimiting 2 options (and see various renditions e.g. as in 'in writing, [or] on a form' versus "in writing on a form". Even oral application is allowed, presumably for exigent circumstances, as occurred here before service in writing on all and filing in the Court.

accommodation is defeated but no appeal can follow, even though the court writes:

> FN14. Moreover, it appears any challenge to an order denying an accommodation should be pursued by a writ petition (rule 989.3(g)(2)), and Linda cites no authority that the denial of a request for an accommodation can be asserted on appeal or provide grounds for reversing the underlying judgment.

And so the appellate decision's discussion of its view on grounds for denial are in any event off-point, since no denial issued and therefore the commentary is speculative, even aside from the statutory predicates having been satisfied; nor is the fact that plaintiff came to court to proceed dispositive (where indeed she was ill on the stand), but the appellate court writes:

> These defects alone provided grounds to deny a request for an accommodation. [FN14] (Rule 939.3(c)(2).) Finally, any alleged error must be deemed harmless because Linda's access to the courtroom was not impaired: Linda and her husband attended and participated in the trial. [Emphasis supplied].

In nexus with and responsibilities toward the federal Act, California's ADA statute does provide for *ex parte* submissions (although, again, Plaintiff here copied all concerned on the mailings) and requires review with an outcome.[14]

> (c) [Process] The following process for requesting accommodations is established: (1) Applications requesting accommodation(s) pursuant to this rule may be presented *ex parte* in writing, on a form approved by the Judicial Council and provided by the court, or orally as the court may allow ... (d)

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[14] Express refusal to respond, therefore, seems to be not even minimal scrutiny on a rational basis of analysis.

> *Grant or Denial of Request.* The court's response must be in writing, must include findings of fact, and must state the nature of any accommodation to be provided. [Underlining Supplied].

Accordingly, express formal denials spring opportunity to appeal:

> 4. Review Procedure The rule provides that an applicant has the right to a review of any decision regarding the provision or denial of requested accommodation. [FN224] If the decision regarding the application was rendered by a bench officer, the applicant has ten days from the notice of decision to file a petition for extraordinary relief in a court of superior jurisdiction. Jones, M., "And Access For All: Accommodating Individuals With Disabilities," In Fall 1997, 32 U.S.F. L. (Univ. Of San Francisco Law Review 75).

The Supreme Court can assess for the benefit of many persons with medical impairments whether it is violative of the ADA to refuse to respond and therefore avoid the appeal procedure in case of denial – emulating denial but delaying the ruling until the occasion when the application sunsets, and forcing on ADA applications the effects of denial without the recourse – creating duties without rights on an equal basis with applicants on other causes; further, as to the mid-trial refusal to read physician papers, although granting accommodations or continuances in contexts of illness are in large part and reasonably so in the court's discretion, boundaries on those powers when court participation is not physically feasible without accommodation, or subsequently when severe illness makes presence in any form not possible, are important concerns. As metaphoric cognate, see e.g. *Tennessee v. Lane*, et al., 541 US 509, No. 02-

1667 (May 17, 2004)); a party to court proceedings no longer must crawl up the steps just to get there.[15]

In accordance with respect for these same laws and principles, the petition is earnestly brought because for others as well as herself it seems to Petitioner that very fundamental court, legal, social, human and civil rights

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[15] And see also *Pacific Gas Co. v. Taylor* (1921) 52 Cal. App. 307 [198 P. 651:

> It is a reversible abuse of discretion to refuse a continuance requested on the ground the Defendant was detained out of state by a serious illness and was the only person familiar with the facts constituting his defense); Betts Spring Co. v. Jardine M. Co. (1914) 23 Cal. App. 705 [139 P. 657] it is a reversible abuse of discretion to refuse a continuance requested on the ground the Defendant, the only witness able to prove his defense, was out of the country due to illness and there was no intimation of bad faith or prejudice to the Plaintiff by reason of a two – month delay). [Cited in Jurado v. Toys "R" Us].

And:

> Of course, the discretion of a trial court is not an uncontrolled power. A proper exercise of judicial discretion requires the exerciser of discriminating judgment within the bounds of reason, and an absence of arbitrary determination, capricious disposition, or whimsical thinking. [Rosevear v. Rosevear, 65 Cal.App.4th, 76 Cal.Rptr.2d 691(1998)]..

And, also, resonating with The Constitution of the state of California's principles of due process and equal protection, congruent with the U.S. Constitution as in Amendments V, XIV, a court of appeal in another instance of superficial rejection or omission to even consider an ADA, § 989.3 application, the court in *Gamet v. Blanchard* (2001), 91 (Cal.App.4th 1276, 111 Cal.Rptr.2d 43), reversed the lower court, "given all of the facts … in a manifest miscarriage of justice."

issues abound here, in addition to sustaining trauma at court that still haunts her today.

SUMMARY

Based on these basic issues, none of the following illustrative attempts to parse the Court of Appeal Decision seems workable; nor does another scenario conferring coherence and mapping the appellate description of trial to the actual transcripts suggest itself

Whatsoever variations are attempted seem only to elude conceptual rigor, where in challenge to fundamental freedoms of fair trials, with equal protection and due process for all in abeyance, the judge ruled immediately for Defendant contra its commitment that for the sake of balance and equity it deferred the closing of plaintiff's case and response to a judgment motion, as well as the chance to sum up – conditions subsequent to allowing the motion to come on which condition however the court itself curtailed by the judgment it immediately pronounced. Hence, on disposition of the case and trial, only Defendant's side solely was heard — although the court, again, earlier recognized and acknowledged on the Record that both sides should be equally granted due process.

In an extensive decision, even in Westlaw compact format, running many pages and hence highlighting the significance of the action (App. B2 hereinbelow), the Court of Appeal restricts its "analysis" to attestations of Defendant/Respondent on briefing, the party solely represented at the latter stages of trial, basically without references to the Trial Transcript at all.

Thus, the Court of Appeal endeavors to show that the merits were in its view on the Defendant's side in the Trust suit and that opposition to a Motion for a Merits Judgment or representation for plaintiff's side of the case would be futile. The effect is to impose a virtual involuntary servitude and circumstantially implausible and impossible scenario of adhesion, after the fact of a trial itself — a

viewpoint on which basis equal protection in and due process concerning court systems seem unfathomable.

A serious issue and problem is the affirmation's collision with the whole matter of self-representation, when applied, and indeed retroactively, either involuntarily, as the appeal court frames the argument, concerning a party who at trial time is known to be medically incapacitated across country, or retroactively being designated as her own counsel only after the trial.

Petitioner respectively submits that either circumstance collides materially and fundamentally with fair play and substantial justice embodied in the Constitution's concern for due process and equal protection.

CONCLUSION

Petitioner respectfully requests that the Supreme Court reverse or vacate the judgment of the trial court on clear and otherwise reversible error, or grant writ of certiorari to the California Court of Appeal which affirmed, or the California Supreme Court which denied Review, or such other and further relief as the Supreme Court may grant.

Dated, Pleasantville, New York. June 16, 2005.

Dr. Linda D. Misek-Falkoff

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(914) 769-3652

Cc: Kirby and McGuinn

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San Diego, California
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APPENDICES

APPENDIX A: PROVISIONS OF LAW

Excerpts of U.S. and State Constitutions:

The U.S. Constitution: Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The U.S. Constitution: Fourteenth Amendment provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

The Americans with Disabilities Act 42 U.S.C. § 12101 et seq. provides:

Who Is Protected Under the ADA? The ADA protects qualified *individuals* with disabilities. An *individual* with a disability is a person who has a physical or mental impairment that substantially limits major life activities; has a record of such an impairment; or is regarded as having such an impairment. Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Under the ADA, a qualified *individual* with a disability is an *individual* with a disability who meets the essential eligibility requirements for receipt of services or participation in programs or activities. Whether a particular condition constitutes a disability within the meaning of the ADA requires a *case-by-case determination*. (The Office for Civil Rights, Your Rights Under the AMERICANS WITH DISABILITIES ACT – web site address: http://www.hhs.gov/ocr/ada.html).

California Rule of Court § 989.3 provides under (c) [Process] The following process for requesting accommodations is established:

(1) Applications requesting accommodation(s) pursuant to this rule may be presented ex parte in writing, on a form approved by the Judicial Council and provided by the court, or orally as the court may allow. Applications should be made at the designated Office of the Clerk, or to the courtroom clerk or judicial assistant where the proceeding will take place, or to the judicial officer who will preside over the proceeding.

(2) "Applicant" means any lawyer, party, witness, juror, or any other individual with an interest in attending any proceeding before any court of this state

... 4) (g) [Review procedure]

An applicant or any participant in the proceeding in which an accommodation has been denied or granted may seek review of a determination made by non judicial court personnel within 10 days of the date of the notice of denial or grant by submitting a request for review to the judicial officer who will preside over the proceeding or to the presiding judge if the matter has not been assigned.

California Code of Civil Procedure § 631.8 provides:

➡§ 631.8. Motion for judgment; partial grant of motion; effect

(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party. Such motion may also be made and granted as to any cross-complaint.

(b) If it appears that the evidence presented supports the granting of the motion as to some but not all the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining. Despite

the granting of such a motion, no final judgment shall be entered prior to the termination of the action, but the final judgment in such action shall, in addition to any matters determined in the trial, award judgment as determined by the motion herein provided for.

(c) If the motion is granted, unless the court in its order for judgment otherwise specifies, such judgment operates as an adjudication upon the merits.

APPENDIX B: TEXTS OF DECISIONS

Chronologically

APPENDIX B1: TRIAL COURT

FILED
Clerk of The Superior Court
DEC 20 2002
By M. BARNAM Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

LINDA MISEK-FALCOFF Individually and as trustee of the Morris W. Douglas and Lee Elinor Douglas Trust
Plaintiff(s)

ALAN DOUGLAS, and DOES 1 through 10, Inclusive
Defendants(s)

JUDGMENT AFTER BENCH TRIAL
(C.C.P. § 631.8)

This action came on regularly for trial on November 6 and 7 and on November 18 and 19 in Department 74 of the San Diego Superior Court, the Honorable Linda B. Quinn, judge presiding. Peter A. Jaffe, Esq., of the Law Offices of Peter A. Jaffe, appeared, pro hac vice, as attorney for Plaintiff Linda Misek-Falkoff, and during trial, was substituted by Plaintiff Linda Misek-Falkoff, in propria persona. Cheryl Edwards Tannenberg, Esq., of Hovey &

Kirby A.P.C., appeared as attorney for Defendant Alan Douglas.

A jury trial was waived. The court heard and considered the testimony of witnesses by Plaintiff and by Defendant, taken out of order, and the documentary evidence presented by Plaintiff and by Defendant.

After the Plaintiff was deemed rested, Defendant made a motion for judgment pursuant to California Code of Civil Procedure § 631.8. The court, after hearing and considering the evidence presented, and the argument of counsel, granted the motion and rendered judgment in favor of Defendant Alan Douglas on all causes of action.

A statement of decision not having been requested by the parties,

IT IS HEREBY ADJUDGED that:

1. Plaintiff Misek-Falkoff recover nothing from Defendant Alan Douglas; and

2. Defendant Alan Douglas recover costs from Plaintiff in the sum of $_____

Dated: 12-20-02

s/ Linda B. Quinn
JUDGE OF THE SUPERIOR COURT
JUDGE LINDA B. QUINN

APPENDIX B2: COURT OF APPEAL

Decision of the Court of Appeal, 4th District,
Briefs and Other Related Documents

Only the Westlaw citation is currently available.
California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Court of Appeal, Fourth District, Division 1, California.
Linda MISEK-FALCOFF, Plaintiff and Appellant,
v.
Alan DOUGLAS, Defendant and Respondent.
No. D041742.
(Super.Ct.No. GIC777112).
Nov. 15, 2004.

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed.

Cheryl Edwards Tannenberg, Kirby & McGuinn, San Diego, CA, for Defendant-respondent.

McDONALD, Acting P.J.

*1 Plaintiff Linda D. Misek-Falcoff (Linda) and Defendant Alan Douglas (Alan) are the children of Morris and Lee Douglas and were the co-trustees and residual beneficiaries of a trust (the Trust) established by their parents. Linda's lawsuit against Alan alleged he breached his fiduciary duties and defaulted in his obligations to provide Linda with information concerning the administration of the Trust and its assets. After a court trial, the court granted Alan's motion for judgment (Code CIF. Proc., § 631.8) and entered judgment in favor of Alan and against Linda. Linda

timely appealed.

I

FACTUAL AND PROCEDURAL BACKGROUND [FN1]

FN1. Linda's brief, filed in *pro se*, cites the evidence supporting her contentions with almost no reference to the evidence supporting the trial court's judgment. Linda's brief thus transgresses the fundamental rule that an appellant's brief must set forth all of the evidence, and may not limit itself only to those facts supporting the appellant's position, which permits us to summarily dispose of her claim that there is insufficient evidence to support the judgment. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.) We nevertheless examine the evidentiary underpinnings for the trial court's judgment, reciting the facts most favorably to the judgment. (*Estate of Teel* (1944) 25 Cal.2d 520, 527; *Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1383, fn. 1.) We recognize the facts we recite little resemble Linda's characterization of the events.

A. The Initial Trust

In 1985 Morris and Lee Douglas established the Trust, with themselves as trustees. The Trust provided that upon the death of the first spouse, the Trust would remain revocable except as to property disclaimed by the surviving spouse, and disclaimed property would then be held in an irrevocable subtrust. The Trust, as subsequently amended, also provided that on the death of the surviving spouse, all tangible personal property then remaining would be distributed equally to Linda and Alan, certain cash distributions would be made to various persons, and any remaining balance would be distributed equally to Linda and Alan.

Morris died in 1988. In July 1989 Lee executed a "disclaimer" of certain property, which subdivided the Trust

into a revocable trust (the survivor's trust, "Trust A") and an irrevocable trust (the decedent's trust, "Trust B"). The disclaimed property (composed of Morris's community property interest in his and Lee's residence (residence), a certificate of deposit, and a Prudential-Bache securities account) funded Trust B. Lee remained trustee for Trust A, and Linda and Alan became cotrustees of Trust B. In August 1989 Alan informed Linda of the mechanism that would be employed to effectuate the division of the assets between Trust A and Trust B, including setting up a Trust B account with Sutro and Company (with Linda and Alan as cotrustees on the Sutro account) with instructions to Sutro to pay the net income from Trust B to Lee as required by the Trust.

B. Administration of Trust A and Trust B

During the ensuing years, the Trust B account grew and Linda was kept informed of its value. Linda received monthly statements from the broker handling the account, and Alan provided Linda with the yearly tax returns filed by Trust B. Between 1992 and 1998, Linda hired several different attorneys to represent her interests as cotrustee of Trust B. During that period, Linda's attorneys sought information about Trusts A and B from attorneys Frederick K. Kunzel and Karen M. Ladner; [FN2] Linda obtained most, but not all, of the information she sought. Alan provided Linda with statements that accounted for the assets, income and expenditures of Trust B.

FN2. Attorney Kunzel drafted the Trust and continued to represent Morris and Lee Douglas in connection with the Trust. Attorney Ladner represented Alan's interests in connection with Trusts A and B.

By the end of 1993, the high cost of providing quality in-home care for Lee exhausted the cash assets of Trust A, and Alan informed Linda it would be necessary to increase the monthly disbursements from Trust B to continue paying for Lee's care. Linda's attorney responded by asking for an accounting of the assets of Trusts A and B and a listing of current income and expenses, which Alan provided. Alan

continued to provide Linda with quarterly accountings of Trust B disbursements and income over the next several years.

*2 In June 1996 Alan informed Linda of the dwindling assets of Trust B and explained the necessity of tapping the equity in the residence (by some form of a reverse mortgage) to generate funds to pay for Lee's needs. Linda did not object to pursuing this financing device, and Alan arranged for the reverse mortgage, the proceeds of which were deposited into Trust B and used entirely to pay for Lee's care.

In the spring of 1998 Linda and Alan decided to sell the residence to retire the reverse mortgage and generate additional funds to pay for Lee's care. [FN3] Linda initially wanted to purchase the residence and made an offer of $387,000; she subsequently withdrew the offer when she was unable to obtain the money to buy the residence. Alan and Linda agreed to hire a real estate agent to examine sales of comparable properties and set a sales price, and in May 1998 Alan informed Linda the residence had been listed with Coldwell Banker for $419,000. Alan kept Linda apprised of the offers on the residence, including the acceptance of an offer of $419,000. The sale closed in July 1998 and the proceeds were used to retire the reverse mortgage; the balance was deposited into the Trust B accounts.

FN3. In March 1998 Alan decided to move Lee from the residence to an assisted living facility because she needed more intensive care than could be provided by the in-home caregiver. Alan told Linda of the move and Linda later visited the facility and approved the decision to move Lee to the facility.

Before escrow on the sale of the residence closed, Alan and Linda discussed disposition of the personal property located at the residence. Alan offered to photograph and inventory the contents, but Linda suggested that all of it be moved to storage, and she would come to

San Diego in August 1998 to inventory the property and agree with Alan on its disposition under the terms of the Trust. Alan agreed to Linda's proposal, and arranged with Lance Bauserman of Ace Storage (a cousin by marriage of Linda and Alan) for the bulk of the personal property to be stored at Ace pending Linda's trip to San Diego. [FN4] Alan kept Linda informed of the progress of the packing and storage, and told Linda the location and contact person at Ace and that it cost over $400 per month to store the property. However, Linda did not travel to San Diego in August of 1998 and, despite the mounting storage costs and Alan's numerous inquiries as to when she would be able to come to San Diego to inventory the property, it remained in storage until Linda's November 2000 visit.

FN4. In the discussions between Linda and Alan, she identified specific items she wanted packed with particular care, and Alan hired Ace come to the residence and carefully pack those items. Alan paid a recent law school graduate $10 per hour to pack the remaining items. With the exception of a few of the more valuable items, which Alan stored at his residence for safekeeping, the packed materials were stored at Ace.

Lee died in March 1999 and Linda came to San Diego for her funeral. By that time, the Trust had liquid assets of approximately $55,000 in addition to the stored personal property. Linda asked for a partial distribution of three specific monetary bequests (to herself and to Alan's two daughters), and Alan complied by sending $25,000 to Linda and $10,000 each to his two daughters, which left the Trust with less than $10,000 in liquid assets.

During the next 18 months, Alan continued asking Linda to come to San Diego so they could together inventory and distribute the personal property, noting the money was running out and storage costs were depleting the remaining Trust funds. He suggested dates to Linda but she did not respond. He also offered to ship all of the personal property to her in New York but she declined to underwrite

the shipping costs. In July 2000 they finally agreed to meet at Ace in August 2000, and Linda agreed to set up an August date with Ace for their meeting, but she did not do so. Instead, the parties finally arranged for a November 2000 meeting with Ace in San Diego. However, the process of unpacking and examining the items for division between Alan and Linda soon became disorganized, and Linda became emotional and confrontational and was unable to make decisions on many cartons of stored items. Although Linda and Alan ultimately agreed on the disposition of a few items, the process ended after several sessions without any decision as to the division of the bulk of the stored property. [FN5]

FN5. The property remained in storage through the date of trial and, because there was no money left in the Trust, Linda paid for the costs of storage starting in late 2000.

C. The Complaint

*3 Linda's complaint, filed October 29, 2001, alleged Alan had misappropriated Trust property and had not fulfilled his obligations to provide Linda with information regarding the assets, liabilities, receipts and disbursements of the Trust. These factual allegations formed the foundation for her claims for breach of fiduciary duty, violation of Alan's obligations imposed by Probate Code sections 16060 and 16061, conversion and an accounting. Alan's answer alleged, among other affirmative defenses, Linda's claims were barred by the applicable statute of limitations.

D. Pretrial Proceedings

Trial was originally scheduled for September 6, 2002, before Judge William Pate, but in early August 2002 Linda moved to continue the trial, alleging she and her husband suffered from medical conditions that necessitated a continuance. Judge Pate denied the motion for lack of good cause but subsequently recused himself from presiding over the trial. Immediately after the matter was reassigned to Judge Quinn, Linda resurrected her motion for a continuance, interposing both her medical condition and her

attorney's unavailability for trial. The court granted this second request and continued trial until October 11, 2002.

On October 11, 2002, Linda moved a third time for a continuance, alleging that her husband (a significant Plaintiff's witness) had suffered an injury to his arm that made travel inadvisable. At the October 11 hearing on her request for a continuance, attorney Jaffe (Linda's counsel) represented that if the court granted a continuance until early November 2002, Linda would either appear for trial at the newly scheduled November 2002 trial or would dismiss the action with prejudice. Based on this firm commitment to either proceed to trial or to dismiss the action with prejudice, the court agreed to continue the trial to November 1, 2002.

A few days prior to the scheduled trial, Linda mailed a letter to Judge Quinn seeking an order rescheduling the trial to November 18, 2002. She asserted this date would (1) permit her husband to complete his doctors' appointments before trial and (2) enable her to attend a conference in San Diego (scheduled for November 14 through 17) where she could consult with physicians specializing in her medical affliction. Alan opposed this fourth request to delay the trial. Linda's request, purporting to be a "request for an accommodation" under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) as implemented by California Rules of Court Rule 989.3, [FN6] was not considered by the trial court because of its ex parte nature and because she was represented by counsel.

FN6. All subsequent rule references are to the California Rules of Court.

However, when Alan appeared for trial on November 1, 2002, attorney Singer (appearing specially on behalf of attorney Jaffe) represented that Jaffe was then engaged in trial in New York and unavailable, and requested that trial be continued until Jaffe had completed the New York trial. The court granted this fifth request for a continuance, and rescheduled trial for November 6.

E. Trial and Judgment [FN7]

FN7. Because many of Linda's appellate claims relate to the events at trial, we detail those events.

*4 The matter was tried to the court on November 6 and 7. On those dates, Linda and her husband testified on Plaintiff's behalf and, to accommodate a witness's schedule, attorney Kunzel was called out of order to testify for the defense. At the conclusion of the November 7 proceedings, the court asked the parties to return on November 12, but attorney Jaffe stated he could not return on that date, and requested that trial resume on November 19. Jaffe indicated it was Linda's intent to rest her case-in-chief after cross-examination and redirect of Linda was completed, and the parties agreed (in Linda's presence) that trial would resume on November 18 at 1:30 p.m. and Linda could appear by telephone if she so elected.

On the afternoon of November 18, 2002, Alan and his counsel appeared at the scheduled resumption of trial. Linda was not present. [FN8] Instead, Linda had apparently delivered a set of medical records in which her doctors suggested the stress of the trial proceedings had fatigued her and exacerbated her medical disabilities and she should not participate in any trial proceedings for at least six to eight weeks. Additionally, Jaffe stated he had been unable to contact her, and asked the court to grant a continuance of six to eight weeks. Jaffe stated, if the continuance was granted, he intended to file a formal motion to withdraw as counsel. The court noted Linda's case-in-chief had been presented, she had been provided the opportunity to participate in further proceedings by telephone, Alan had traveled a great distance to attend trial, Jaffe was present to represent her interests, and this was the sixth request for a continuance. It therefore denied the motion for a continuance. Alan then called two witnesses and Jaffe cross-examined those witnesses.

FN8. Linda stated on November 7 she wanted to be personally present when trial resumed.

The following morning, Alan and counsel for both

parties appeared to complete the trial, but Linda was again absent. Alan took the stand. After approximately one hour of Alan's testimony, Linda telephoned the court's business office, acting hysterically, and stated she was to undergo surgery in one hour and needed to talk with someone. The court declared a recess to permit Jaffe to speak with her privately. Jaffe returned to court after talking with Linda and informed the court she had relieved him as counsel and wanted to proceed in *pro se*. The court refused to order that Jaffe be relieved as attorney of record absent a direct request or motion made by Linda, and reiterated Linda had been offered the opportunity to participate by telephone or videoconferencing but had declined those opportunities. Accordingly, Jaffe remained and the morning session of trial continued.

Shortly before the noon recess, Linda telephoned the court and complained she had no notice that trial would resume on November 18, a comment the court characterized as "preposterous." Linda stated she wanted to relieve Jaffe because he had not told her of either the scheduled resumption of proceedings or her right to appear by telephone. Linda reiterated her desire to dismiss Jaffe and substitute herself in *pro se*, and also asked for a continuance to allow her to retain new San Diego counsel. The court, after warning Linda that the case was "going forward," asked whether Linda wished to have Jaffe remain as her counsel. Linda reiterated her wish to terminate her representation by Jaffe. The court directed Jaffe to contact Linda during the lunch break to determine whether she might withdraw her demand to terminate Jaffe's representation and substitute herself in *pro se*, and directed Linda to reestablish telephone contact after the lunch recess.

*5 Following the lunch recess, Linda did not reestablish telephone contact. At that time, Jaffe noted Linda had the absolute right to discharge him. He also stated, because an attorney is subject to disciplinary action if he appears in an action without his client's authority, he was

forced to accede to Linda's instruction that he withdraw as counsel. Jaffe then departed. Alan completed his direct examination, and the court deemed Linda had rested.

Alan immediately moved under Code of Civil Procedure section 631.8 for judgment in favor of the defense. The court granted the motion. Linda did not request a statement of decision and the court entered a judgment providing that Linda recover nothing from Alan. Linda timely appealed.

II
ANALYSIS
A. The Attorney Issue

Linda argues Jaffe's departure during the final hours of the trial left her unrepresented at trial and his absence (as well as his errors in representing her interests) require reversal of the judgment. [FN9]

> FN9. Linda also appears to assert the judgment should be reversed because, after she terminated Jaffe and substituted herself in *pro se*, the trial court erred by denying her request for a continuance of the trial (for some unspecified time) to locate new counsel. We evaluate this issue in connection with her claims that the trial court abused its discretion when it declined her multiple requests to delay the trial.

A civil litigant has the right to act as his or her own attorney (*Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 129-130), and at trial Linda exercised her "absolute right" (*Scott v. Superior Court* (1928) 205 Cal. 525, 527) to discharge Jaffe and substitute herself in his stead. Linda argues, however, under *Faretta v. California* (1975) 422 U.S. 806 and its progeny, a judgment may be reversed when a litigant's decision to representation *pro se* is not a voluntary and intelligent election. Linda argues, because the record shows she felt impelled to terminate Jaffe and the record contains no evidence that the trial court made an adequate inquiry into whether her decision to terminate Jaffe

and to proceed *pro se* was a knowing and intelligent election to proceed *pro se*, reversal is required. (*Faretta v. California, supra*, 422 U.S. at p. 835; accord, *People v. Lopez* (1977) 71 Cal.App.3d 568, 571.) Linda attempts to import *Faretta* into a civil proceeding. However, the right to effective assistance of counsel and the corollary waiver of counsel, which form the foundation for *Faretta* and its progeny, are predicated on the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. Both the federal and state Constitutions explicitly provide the provisions relative to assistance of counsel *apply only to criminal prosecutions.* Because Linda cites no authority extending *Faretta's* standards to a civil litigant's election to proceed in *pro se*, her claim of error is not persuasive.

Linda also appears to assert the judgment should be reversed because Jaffe allegedly committed malpractice in connection with representing her interests. We need not examine whether Jaffe's actions fell below the applicable standard of care for purposes of a claim for damages against Jaffe by Linda because, even if Jaffe negligently handed the litigation, "it does not furnish a basis for the reversal of a judgment entered against the client because of such failure of the part of his [or her] attorney." (*Kim v. Orellana* (1983) 145 Cal.App.3d 1024, 1028.)

*6 Linda finally argues the trial court's error in permitting her to dismiss Jaffe and substitute herself in *pro se* requires reversal because, although she was entitled to appear in *pro se* to prosecute her claims as a beneficiary, her lawsuit also purported to plead claims as a cotrustee on behalf of the Trust. She asserts that because this court barred her from appearing on behalf of the trust on appeal, on the ground that only an attorney may appear on behalf of an entity, the trial court necessarily erred when it permitted her to appear on behalf of the trust at trial. However, an appellant may not obtain reversal based on errors favorable to the appellant or injurious only to nonappealing coparties.

(9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § § 321-323, pp. 360-362.) To the extent the trial court permitted Linda to represent the interests of the Trust, the error was favorable to Linda in her individual capacity (by permitting her to appear without a license) and was injurious only to the nonappealing Trust. [FN10]

FN10. This court, in its July 28, 2003 order, construed the judgment entered below and concluded that "there was no judgment entered against the trust. Therefore, the trust is not a party to this appeal and [Linda] is an appellant solely in her individual capacity and not as a trustee."

B. The Continuance Issues

Linda appears to argue the court abused its discretion when it refused two separate requests for a continuance. She first asserts it was an abuse of discretion to deny her pretrial request for a continuance of the trial. She also contends it was an abuse of discretion to deny her midtrial request for a continuance to allow her the opportunity to locate counsel to represent her after she terminated representation by Jaffe.

Standard of Review

A motion for a continuance of trial is addressed to the trial court's discretion, which will not be disturbed on appeal absent a clear showing of an abuse of discretion, and the burden rests on the complaining party to demonstrate from the record that the order was an abuse of discretion. (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984-985.) Motions to continue trial are generally disfavored (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17; Cal. Rules of Court, rule 375(a), (c)), and the court may consider such factors as the grounds asserted for the request, the proximity of the request to the scheduled trial, any prior requests for continuances, the availability of alternative means to address the problem that gave rise to the requested continuance, the prejudice the opposing party or witnesses would suffer were the request granted, the court's calendar, and any other relevant circumstances. (Rule 375(c), (d).)

The Pretrial Request

Linda appears to argue the trial court abused its discretion by denying her application to delay the start of trial. A few days prior to the scheduled November 1, 2002 trial date, Linda mailed a letter asking to delay the start of trial to November 18, 2002, to enable her husband to complete his doctor's appointments before trial and to allow her to coordinate the start of trial with other travel plans. [FN11] Alan opposed this request to delay the trial. The court ultimately granted a different request to reschedule trial, and continued the trial until November 6. [FN12] On this record, the court could well conclude, insofar as it was based on the alleged unavailability of a necessary witness because of a medical condition, Linda's husband's medical condition had already served as a basis for one continuance, [FN13] the problem could be handled by having the witness telephonically appear, the application for a continuance was untimely, and this was the fourth time Linda sought to delay trial. Moreover, insofar as it was based on the convenience of Linda's travel plans, her convenience does not provide good cause. (See, e.g., *Lazarus v. Titmus* (1998) 64 Cal .App.4th 1242, 1250-1251.) The court's refusal to grant Linda's request to continue the trial to November 18 was not an abuse of discretion.

FN11. Specifically, Linda indicated she wanted to attend a conference in San Diego scheduled for November 14 through 17 (at which she could consult with physicians specializing in her medical affliction) which was "just a stone's throw from the courthouse."

FN12. The continuance was granted because Jaffe was engaged in trial in New York and was then unavailable.

FN13. Specifically, Linda's October 11, 2002 motion alleged her husband was a significant Plaintiff's witness and his arm injury made travel inadvisable. Jaffe represented that if the court granted a continuance until early November, Linda would either appear for trial at that time or would dismiss the action with prejudice, and

the court agreed to continue the trial to November 1, 2002, on that basis.

*7 Linda appears to argue because her pretrial request to delay the start of trial was characterized as a request for an accommodation under rule 989.3, some different (and undefined) standard of review should apply. However, the request was not timely because it was submitted fewer than five court days prior to the hearing (rule 989.3(c)(3)), and it was not on the required form. (Rule 989.3(c)(1); see Judicial Council Form MC-410.) Moreover, Linda's letter did not describe a physical impairment obstructing her access to the courtroom, and therefore was necessarily silent on what accommodation was appropriate to remove the obstacles to access. (Rule 989.3(c)(2).) These defects alone provided grounds to deny a request for an accommodation. [FN14] (Rule 939.3(c)(2).) Finally, any alleged error must be deemed harmless because Linda's access to the courtroom was not impaired: Linda and her husband attended and participated in the trial.

FN14. Moreover, it appears any challenge to an order denying an accommodation should be pursued by a writ petition (rule 989.3(g)(2)), and Linda cites no authority that the denial of a request for an accommodation can be asserted on appeal or provide grounds for reversing the underlying judgment.

The Midtrial Request

Linda appears to argue the trial court abused its discretion when, after she terminated Jaffe's representation and substituted herself in *pro se*, it denied her request for a continuance to obtain new counsel. However, Linda was warned the case would proceed even if she terminated Jaffe as her attorney and the court accorded her the opportunity to reconsider her decision, but she nevertheless terminated him as her attorney and substituted herself in *pro se*. The court had already granted Linda several continuances, the last of which was granted only after Linda firmly committed the matter would not be further continued; the parties were

nearing the end of the evidentiary presentation and Jaffe was prepared and willing to proceed to the conclusion of trial; and Alan had undergone considerable inconvenience to appear on the appointed trial date. Under these facts, Linda has not shown an abuse of the court's discretion to grant or deny a trial continuance. (*Agnew v. Parks* (1963) 219 Cal.App.2d 696, 700-703 [a party cannot insist on another continuance merely because he terminates his chosen attorney on the eve of trial and substitutes himself in *pro se*, knowing the court has declared trial will nevertheless proceed]; *Slaughter v. Zimman* (1951) 105 Cal.App.2d 623, 625.)

C. The Substantial Evidence Claim

Linda's final challenge asserts the judgment is not supported by substantial evidence. [FN15] Because Linda's brief contains minimal references to the evidence at trial, and even then cites almost exclusively to the evidence supporting her contentions with only scant reference to the evidence supporting the trial court's order, this claim is waived. (*Toigo v. Town of Ross, supra*, 70 Cal.App.4th at p. 317; *Brockey v. Moore, supra*, 107 Cal.App.4th at pp. 96-97.)

FN15. Linda's brief is not a model of clarity but it appears the arguments she denominates as her third, fourth, fifth and ninth arguments are all iterations of her claim the judgment is not supported by substantial evidence. We do not separately evaluate each iteration of her claim, but instead examine whether Linda has established the judgment lacks evidentiary support.

Even assuming Linda preserved this argument for appeal, we would reject her contention. Linda did not request a statement of decision, and we therefore presume on appeal the trial court found all the facts necessary to support the judgment. (*In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 553, fn. 4.) The trial court could have concluded Alan's testimony and evidence were credible, and Linda's evidence was not; a determination crediting Alan's

testimony would alone require us to affirm the judgment notwithstanding Linda's contrary evidence. [FN16] (*Menning v. Sourisseau* (1933) 128 Cal.App. 635, 639; *Estate of Teel, supra*, 25 Cal.2d at p. 527.) By way of example only, Linda asserted Alan mismanaged the trust assets by secretly borrowing against the residence at exorbitant interest rates and, after Lee's death, hastily selling the residence instead of awaiting a more lucrative offer. However, Alan presented evidence Linda was apprised of the need to capitalize on the equity in the residence (to generate funds to pay for Lee's medical needs) and of the available methods and costs for obtaining such funds (reverse mortgages at specified interest rates), and Linda did not object to Alan's pursuit of this action. Alan also testified that after Lee's death, the decision to sell the residence was mutual; Linda was provided the opportunity to purchase the residence but was unable to arrange the finances; Alan and Linda agreed to hire a real estate agent to examine comparable sales and set a price; Alan informed Linda the residence had been listed for $419,000 and kept Linda apprised of the offers on the residence and the acceptance of an offer for $419,000; and Linda made no objection to that sale. Alan's evidence, which supports a presumed finding that he did not mismanage trust assets, supports a judgment that Linda's claim of breach of fiduciary duty was not established.

> FN16. Linda appears to argue that because Jaffe was terminated as her attorney before he could cross-examine Alan and present a closing argument, Linda should not be held responsible for any evidentiary gaps in her case. As previously discussed, Linda was entitled to replace Jaffe with herself in *pro se*, " 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded.' [Citations.] ... 'A layman with resources who insists

> upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney--no different, no better, no worse.' ... The fact that a layman elects to represent himself 'certainly does not excuse him from a failure of proof' of his cause of action. [Citation.]" (Lombardi v. Citizens Nat. Trust etc. Bank (1955) 137 Cal.App.2d 206, 208-209.)

*8 Alternatively, there is substantial evidence to support a presumed finding any claims by Linda were barred by the statutes of limitations. Alan's evidence showed, throughout the existence of the Trust and continuing after Lee's death, Linda was provided with regular accountings (on a monthly, quarterly and/or yearly basis) of the Trust assets, liabilities, receipts and disbursements, and Alan reported the steps he took to administer and preserve the Trust assets. These accountings and reports support the presumed finding any claims by Linda against Alan that accrued prior to October 29, 1998, were time-barred. (*Noggle v. Bank of America* (1999) 70 Cal .App.4th 853, 857- 861.) Linda does not on appeal direct our attention to any evidence of a breach by Alan of his fiduciary duty that would *not* be time-barred (e.g. a breach occurring after October 29, 1998), and therefore the evidence supports the presumed finding all of Linda's claims against Alan were time-barred.

Because the trial court's judgment could have been predicated *either* on a determination Linda did not establish the elements of her claims by a preponderance of the evidence *or* on a finding Alan established an affirmative defense to Linda's claims, and either predicate finds substantial evidentiary support in the record, we reject Linda's appellate claim the judgment is not supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Alan is entitled to costs on appeal.

WE CONCUR: AARON and IRION, JJ.

2004 WL 2580817 (Cal.App. 4 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

Briefs and Other Related Documents (Back to top)

- 2004 WL 1513467 (Appellate Brief) Appellant's Reply Brief (Jun. 07, 2004) Original Image of this Document with Appendix (PDF)

- 2004 WL 225555 (Appellate Brief) Appellant's Opening Brief (2004) Original Image of this Document with

Appendix (PDF)
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APPENDIX B3: CAL. SUPREME COURT

Court of Appeal, Fourth Appellate District, Division One
No. D041742
S130273
IN THE SUPREME COURT OF CALIFORNIA
En Banc

LINDA MISEK-FALCOFF, PLAINTIFF and Appellant,

v.

ALAN DOUGLAS, Defendant and Respondent.

Petition for review DENIED.
The Request for an order directing publication of the opinion is denied.

SUPREME COURT
FILED
FEB 16 2005
Frederick K. Ohlrich
Clerk

DEPUTY

GEORGE

Chief Justice